

MAY 13 1993

Before the
FEDERAL COMMUNICATIONS COMMISSION

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Washington, D.C. 20554

In Re Applications of)	MM Docket No. 93-75
TRINITY BROADCASTING OF FLORIDA,)	
INC.)	BRCT-911001LY
For Renewal of License of)	
Television Station WHFT(TV))	
Miami, Florida)	
GLENDAL E BROADCASTING COMPANY)	BPCT-911227KE
For Construction Permit)	
Miami, Florida)	

To: Hon. Joseph Chachkin
Administrative Law Judge

**CONTINGENT MOTION TO ENLARGE ISSUES
AGAINST GLENDAL E BROADCASTING COMPANY**

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SUMMARY

Several basic issues must be designated against Glendale Broadcasting Company ("Glendale") in light of egregious misconduct in other Commission proceedings by its controlling principal, George F. Gardner (Gardner"), and flagrant misconduct by Glendale itself in this proceeding.

The Commission has already adjudged Gardner guilty of misrepresentation and lack of candor in a previous broadcast application and hearing. Although he therefore has been declared subject to "heightened scrutiny" and must show that he is now rehabilitated, Gardner has prima facie failed to make an adequate showing. Indeed, there is overwhelming evidence that he remains wholly untrustworthy and unreliable.

While Gardner promised the Commission in 1990 that he would henceforth be scrupulously honest and careful in all FCC matters, that pledge is now exposed as a sham.

In this very application, Glendale has misrepresented the availability of its proposed transmitter site, and appears to have falsely certified its financial qualifications as well. With regard to the site, Glendale has not disclosed that the tower owner's offer of a commitment expired by its own terms on January 31, 1992, when Glendale failed to deliver a signed acceptance. Moreover, because of pre-existing lease obligations that are binding on the tower owner, Glendale in any event could

not gain access to the site for at least two years after this proceeding and all appeals have ended. Thus, Glendale never had reasonable assurance of the site. Regarding financial certification, it appears that Gardner did not obtain requisite appraisals of his non-liquid assets before representing in Glendale's application that those assets would cover estimated costs. Site certification, site availability, and financial certification issues, therefore, are all warranted.

Despite Gardner's 1990 "rehabilitation" pledge, Glendale is also guilty of at least 25 reporting violations, having failed to disclose the pendency and disposition of several other broadcast applications filed by Gardner. These repeated violations are especially significant, not only because of the "heightened scrutiny" to which Gardner is subject here, but

Finally, there is a serious question about Glendale's intent to construct the station it proposes here, given Gardner's failure to build the several LPTV stations for which he recently held permits.

In light of the foregoing, appropriate issues must be designated for hearing so that Gardner's conduct, past and present, may be given the "heightened scrutiny" the Commission has mandated before he can be granted any new broadcast license. The designation order should include forfeiture notices for the extensive misconduct involving misrepresentations and/or lack of candor before the Commission by Gardner and applicants under his control.

RECEIVED

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Trinity Broadcasting of Florida, Inc. ("TBF"), by its
counsel, pursuant to Section 1.229(b)(2) of the Commission's
Rules, hereby files this contingent motion to enlarge the issues
against Glendale Broadcasting Company ("Glendale"). This motion

A. Introduction

1. If Glendale's application is not dismissed at the threshold, then several issues must be designated for hearing to determine whether Glendale is basically qualified to be a Commission licensee. These include:

(a) whether Glendale is disqualified by the fact that George F. Gardner ("Gardner"), Glendale's president and controlling owner, is adjudicated to have misrepresented and lacked candor in another FCC broadcast licensing proceeding;

(b) whether Gardner has proved that notwithstanding his record of deceitful conduct he is now "rehabilitated" and should be entrusted with an important license;

(c) whether Glendale has falsely certified that it has reasonable assurance of the availability of its proposed transmitter site;

(d) whether Glendale does in fact have an available site;

(e) whether Glendale falsely certified its financial qualifications;

(f) whether Glendale has repeatedly violated the Commission's reporting rules by omitting required information from its application and failing to report significant developments by amendment;

(g) whether Gardner has violated explicit representations he made to the Commission in 1990 concerning regulatory compliance procedures he would follow in the future;

(1) whether Gardner's recent history of failing to construct low power television stations for which he applied and obtained construction permits in 1990 demonstrates that Glendale cannot be relied upon to build and operate the station for which it is now applying.

2. All of these matters raise very serious doubt about the fundamental reliability and integrity of Glendale and its controlling principal. Considered either separately or cumulatively, they strongly suggest that Glendale is not fit to be trusted with a broadcast license. Therefore, unless Glendale's application is dismissed at the outset, the issue of Glendale's basic fitness must be thoroughly examined at the

B. Adjudicated Misrepresentations/Lack of Candor

3. We begin with George F. Gardner's record of adjudicated dishonesty in dealing with the Commission.

4. Gardner is Glendale's 51% stockholder, President, Secretary, Treasurer, and a Director.^{2/} He signed the original application, all three amendments thus far filed, and Glendale's "Integration and Diversification Statement." He is financing the prosecution of the application by lending Glendale up to \$350,000 for that purpose.^{3/} In addition, he has committed to fund the construction and initial operation of the station by personal loan if a financing institution is not used.^{4/} From all of this it is clear that Gardner is Glendale's dominant principal, both in law and in fact.

5. In 1983 Gardner, as sole owner of an applicant called Adwave Company, applied for the license of RKO's radio station WAXY(FM), Fort Lauderdale, Florida (BPH-830510AL). To gain a

^{1/}(...continued)

WAXY-FM, Fort Lauderdale, Florida, was disqualified for misrepresentations and lack of candor, but managed nonetheless to walk away with a \$2,000,000 settlement. RKO General, Inc. (WAXY-FM), 5 FCC Rcd 642 (1990).

^{2/} The only other principal is Gardner's daughter, who holds 49% of the stock and is an officer and director.

^{3/} See Section 9 of the "Stockholders Agreement of Glendale Broadcasting Company," which is Exhibit 1 of Glendale's application (Attachment 1 hereto).

^{4/} Id., Section 10.

comparative advantage over the other applicants in that proceeding, Gardner represented that if his application were granted he would "divest himself of all of the stock he own[ed]" in his family-owned cable television companies. However, when he was subjected to cross-examination on that pledge it turned out that he had never had any intention to relinquish his CATV holdings; he intended merely to put them in trust while retaining all the incidents of beneficial ownership (including the right to convey these interests by gift or will).^{5/}

6. ALJ Joseph Stirmer found that "Gardner misrepresented facts and/or was lacking in candor" when he submitted his divestiture commitment. The pledge was "not made in good faith," and the contemplated trust arrangement was "disingenuous." By his "false divestiture commitment" Gardner displayed "a willingness to deceive the Commission," and the explanation he proffered on the witness stand was "not credible." The ALJ held that this misconduct disqualified Gardner (Adwave). RKO General, Inc. (WAXY-FM), 2 FCC Rcd 3348, 3360 (§§116, 117), 3362 (§131) (ALJ 1987) (Attachment 2).

7. The Review Board agreed, concluding that "Gardner misrepresented facts or, at a minimum, was lacking in candor."

^{5/} The facts are set forth in the decisions in MM Docket No. 84-1112 et seq. rendered by the Administrative Law Judge, the Review Board, and the Commission, the relevant portions of which are appended for convenience of reference as Attachments 2-4 hereto, respectively.

In the Board's words, "it is patent that this pledge by Gardner was not made in good faith." Affirming the ALJ's adverse determination concerning Gardner's credibility, the Board found Gardner's proffered explanation "impossible to accept." And, in an observation particularly relevant to Gardner's qualifications here, the Board stated that "Adwave's lack of candor before the Commission, especially in a hearing proceeding, is indicative of its future behavior." RKO General, Inc. (WAXY-FM), 4 FCC Rcd 4679, 4684 (¶¶27, 29) (Rev. Bd. 1989) (Attachment 3).^{6/}

8. Gardner did not ask the Commission to reverse or set aside the misrepresentation/lack of candor findings made by the ALJ and the Board. Instead, urging the Commission to approve a settlement that would pay him \$2,000,000 to dismiss his application, he merely asked for a ruling that the adverse character determination would not bar him from acquiring other stations in the future. RKO General, Inc. (WAXY-FM), 5 FCC Rcd 642 (1990) (Attachment 4).^{7/} Significantly, however, the Commission declined to make the categorical ruling that Gardner sought. Said the Commission, "We cannot find on the record before us that Gardner [is] qualified, without reservation, to acquire additional stations." Id. at 644 (¶18). Accordingly,

^{6/} Although one Board member dissented to these findings, the Board majority plainly found the ALJ's reasoning and credibility findings more persuasive than the arguments made in the dissent.

^{7/} Reference to the \$2,000,000 settlement amount is found at ibid., n. 1.

the Commission held that in "any application for a new station" Gardner would have to submit a "showing of good character." Such showing would have to "make an affirmative demonstration of rehabilitation" and establish that he "then" possessed good character. In particular, Gardner would have to demonstrate that during the intervening time up to the filing of the new application his "conduct and compliance with the law . . . has been beyond reproach." Moreover -- and this assumes special importance in light of matters discussed below -- the Commission made very clear that "there should be no occurrence of misconduct in connection with the new application." In short, said the Commission, any application Gardner filed in the future would subject him to "heightened scrutiny." *Id.* (¶¶19, 21-22; emphasis added).

9. The "heightened scrutiny" began in 1990, when Gardner submitted a "rehabilitation" showing in applications he filed for several low power television (LPTV) construction permits.^{8/} The showing consisted mainly of promises to exercise care and establish certain procedures to ensure compliance with all Commission requirements in the future. Although the Mass Media Bureau accepted the showing as sufficient to warrant grant of the LPTV applications, it expressly refused to apply that ruling

^{8/} See Declaration of George F. Gardner filed March 14, 1990 (Attachment 5 hereto) and Declaration of George F. Gardner filed May 7, 1990 (Attachment 6) hereto.

to any future applications Gardner might file. Instead, the Bureau told Gardner:

"[W]e see no reason at this time to remove the RKO procedure for all future applications for new stations. In view of the Commission's clear directive to the Bureau, we believe it is appropriate to continue to subject future applications by you to 'heightened scrutiny.'"

Therefore, said the Bureau, Gardner would have to make an "affirmative showing" of rehabilitation and good character with any future broadcast application, and grant of such application would depend on "fulfillment of the requirements set forth by the Commission."^{2/}

10. Despite the Bureau's clear instruction that in each new application Gardner make a new rehabilitation showing along the lines prescribed by the Commission, Gardner blatantly skirted that requirement in the instant application. He provided no new information. Instead, he merely incorporated by reference the same submission he made in 1990 with the LPTV applications.^{10/} The current perfunctory showing makes absolutely no effort to update the now-stale 1990 submission or to demonstrate with particularity the steps taken by Gardner since the previous showing to ensure his compliance with all

^{2/} See Letter of Roy J. Stewart to George F. Gardner dated July 23, 1990 (Attachment 7 hereto).

^{10/} See Glendale Application, Exhibit 2, p. 3 (filed December 1991) (Attachment 8 hereto).

Commission rules. On its face, this does not satisfy the Commission's directive in RKO.

11. The Commission held that any rehabilitation submission by Gardner, at a minimum, would have to demonstrate that he "intends to undertake meaningful measures to prevent the future occurrence of FCC-related misconduct." 5 FCC Rcd at 644 (¶21) (Attachment 4). In his 1990 rehabilitation submission, Gardner made two representations in that regard. First he stated:

"I now realize the importance of being absolutely candid in applications and statements made by me to the Commission, and have resolved to carefully review any such applications and statements to ensure that they fully and accurately disclose any pertinent facts" (emphasis added).^{11/}

Then, in a supplemental declaration disclosing that his company had violated the FCC's cable rules (a fact he had previously failed to mention), Gardner made the following representation:

"I have instructed my FCC counsel . . . to devise a compliance program which will ensure that Raystay's operation of its low power television station is strictly in compliance with all Commission Rules and Regulations. I have further instructed

12. The Bureau noted and relied on those representations in determining to grant Gardner's LPTV applications. (See Attachment 7, p. 2.) Now Gardner must show that he has actually lived up to his promises in the intervening period. Glendale's superficial reiteration of the original promises plainly does not establish that Gardner is rehabilitated. It offers no evidence at all that Gardner has faithfully followed through on his promises. Since he secured a grant in 1990 based on what he said he would do, any updated rehabilitation submission would have to demonstrate that he has honored his pledges and has in fact done what he said he would do. At a bare minimum, Gardner would have to document the details of the "compliance program" he said he would establish, the history of quarterly reporting he said he would require from his counsel, and the instances of his personally reviewing applications for accuracy and completeness in disclosing all pertinent facts (as he pledged he would do). Such a showing would go to the heart of the Commission's concern about Gardner, namely the trustworthiness of his representations to the Commission and his reliability in compliance matters.

13. Because Glendale has tendered no such submission in its application, it has not made an adequate showing -- even at the outset -- that Gardner is currently qualified. The following threshold issue should therefore be designated:

"To determine (a) whether the submission made in Glendale's application regarding the

rehabilitation of George F. Gardner is of sufficient scope and currency to meet the standards for rehabilitation submissions prescribed for Mr. Gardner by the Commission in RKO General, Inc. (WAXY-FM), and (b) if not, whether Glendale has made an adequate threshold showing that Gardner is currently qualified."

14. Beyond this threshold issue concerning Gardner's "rehabilitation" showing, there is plainly also a substantial and material question on the merits concerning the grantability of Glendale's application in light of the adverse character findings against Gardner in RKO. Since both the Commission and the Bureau have expressly declined to rule that Gardner is qualified to acquire additional stations, the 1990 LPTV grants do not resolve the question for Glendale's present application. Gardner's past misconduct, as found in RKO, remains at issue. Thus, the following issue must be designated here:

"To determine whether Glendale Broadcasting Company is qualified to be a Commission licensee in light of the findings and conclusions concerning misrepresentation and/or lack of candor made against George F. Gardner in MM Docket No. 84-1112 et seq. (RKO General Inc. (WAXY-FM)).

This formulation will allow for consideration of all relevant factors that may bear on the weight to be assigned to Gardner's RKO misconduct, including the extent of his rehabilitation and

the effect of other violations or misconduct of which he is guilty.^{13/}

15. Designation of the foregoing issues by the Presiding Judge is entirely appropriate. In RKO, the Commission made clear that it would rely on information brought forward by others in forming its judgment about Gardner should he file applications in the future. Indeed, the Commission all but invited such assistance, stating that "any persons with adverse information about [Gardner] may submit this to the Commission." Id. (¶21). While Glendale's reliance on a stale rehabilitation showing is itself enough to warrant an issue, enlargement of the issues is further compelled by overwhelming evidence (set forth below) that Gardner is not the least bit rehabilitated.

16. No additional adverse information was before the Commission when it adopted the hearing designation order in this case, and the order is completely silent on the rehabilitation issue.^{14/} Indeed, although Glendale's application (in Exhibit

To the contrary, it appears that with its attention focused entirely on the allegations involving Trinity Broadcasting Network ("TBN") and National Minority TV, Inc. ("NMTV"), and with no mention of the Gardner matter in any pre-designation pleading, the Commission did not consider it. Had it done so, the HDO certainly would have discussed Glendale's purported rehabilitation showing and made a specific finding concerning Gardner's qualifications under the specially prescribed "heightened scrutiny" standard.^{15/}

17. Where a particular relevant matter has not been fully considered in the designation order, or the designation order contains no reasoned analysis of the matter, enlargement of the issues is appropriate. Atlantic Broadcasting Company, 5 FCC 2d 717, 720-21 (1966). This is true even though the matter "may have been before [the Commission] in a peripheral manner when th[e] proceeding was designated for hearing" (as was arguably the case here because Glendale's application referred to it). Id. at 720. If there is no reasoned analysis in the designation

^{15/} In contrast to the silence of the HDO on this matter is the Commission's detailed treatment of the same issue in connection with Gardner's previous rehabilitation submission under the "heightened scrutiny" procedure. See Attachment 7. There, the Mass Media Bureau engaged in a six-paragraph review and analysis of Gardner's qualifications to hold LPTV licenses. Since the HDO in this case contains nothing like the review undertaken in the Bureau's 1990 ruling, it seems clear that the Commission gave no consideration to the matter when it adopted the HDO.

order, a petition to enlarge need not rely on "previously unknown facts." Id.

18. Nonetheless, as indicated, there are also serious questions about Glendale's conduct in this proceeding that raise even greater doubt about reliability and candor of Glendale's purported rehabilitation showing. These matters, which warrant basic qualifications issues in their own right, assume special significance in view of the Commission's pointed admonition to Gardner that "there should be no occurrence of misconduct in connection with the new application." 5 FCC Rcd at 644 (§21) (Attachment 4). To these matters we now turn.

C. False Transmitter Site Certification

19. In its application, filed December 27, 1991, Glendale (over the signature of George F. Gardner) certified that it had reasonable assurance that the transmitter structure proposed in its application was available to it. See, Glendale Application, Section VII, Question 2 (Attachment 9 hereto). At no time since filing its application has Glendale amended that certification. Hence, Glendale has maintained an ongoing representation that the proposed site remains available to it.

20. The site in question is the so-called "Candleabra" tower in Pembroke Park, Florida, owned by Tak Broadcasting Corporation ("Tak"). Appended as Attachment 10 hereto is the affidavit of Tak's Tower Manager and Chief Engineer, James L.

Sorensen. The affidavit and its attachments make clear that Glendale has lacked assurance of site availability at least since January, 31, 1992, when Tak's written offer of a commitment to Glendale expired. The pertinent facts are as follows

22. As attested by Mr. Sorensen, neither Glendale nor any agent or representative of Glendale delivered an executed acceptance of the offer. Thus, as Mr. Sorensen now confirms, Tak's offer to Glendale expired by its own terms as of January 31, 1992. Moreover, according to Mr. Sorensen, Tak has received no communication of any kind from Glendale since the written offer was sent.

23. From this it is clear that Glendale lost any site availability assurance it may have had when it failed to deliver an executed acceptance of the written offer by January 31, 1992, as the plain terms of the offer required. Furthermore, Glendale had no basis after that point to believe or assume that the site would remain available. In warning that the offer would be "null and void" after January 31, 1992, Tak's letter made very clear that Glendale would have no ongoing rights or assurances if it did not meet the acceptance deadline.

24. Having lost any arguable reasonable assurance as of January 31, 1992 (about a month after it filed its application), Glendale was required to report that critical adverse development to the Commission.^{16/} It has never done so.

^{16/} National Communications Industries, 6 FCC Rcd 1978, 1979 (Rev. Bd. 1991) ("If the transmitter site becomes unavailable after an applicant certifies that it has reasonable assurance, that significant change must be reported within thirty days, in accordance with 47 CFR 1.65"); See also, Belo Broadcasting Corp., 68 FCC 2d 1479, 1487-88 (1978) (applicant is "obliged to correct any
(continued...)

Instead, it has allowed its application to go forward for more than 15 months with what became (as of January 31, 1992) an ongoing misrepresentation that the site remained available. Section 73.1015 of the Rules states, "No applicant . . . shall . . . in any application . . . make any misrepresentation or willful material omission bearing on any matter within the jurisdiction of the Commission." 47 C.F.R. §73.1015. Glendale's false continuing site certification plainly violated that rule here. Accordingly, the following issue should be designated:

"To determine whether Glendale has made misrepresentations or lacked candor concerning the availability of its proposed transmitter site in violation of Section 73.1015 of the Commission's Rules and, if so, the effect thereof on Glendale's qualifications to be a licensee."

D. Lack of Site Availability

25. The preceding discussion also makes clear that, beyond the matter of false certification, Glendale is unqualified because it lacks reasonable assurance of a transmitter site. This has been so not only since January 31, 1992 (for the reasons stated above) but, as we now show, from the very outset. In short, the Candleabra tower site has never been available to Glendale.

^{16/}(...continued)

material inaccuracies" and to "rectify known inaccuracies in materials presented to the Commission").

26. As reflected in the offer letter attached to the Sorensen Affidavit (Attachment 10), the tower space in question is the space now occupied by WHFT(TV), the incumbent station under challenge by Glendale in this proceeding. Tak's offer letter (in subsection (j)) specified that the only space on the tower available to Glendale was the space now used by WHFT(TV), and provided that the offer "cannot cannot be honored for the purpose of new construction except if the apparatus of WHFT is removed." The letter further stated (at p. 2) that Tak "will terminate its lease with WHFT-TV" if the FCC awards the license to Glendale, and that Tak's leases "automatically terminate as a condition of default when a tenant loses [sic] its FCC license." These statements ostensibly establish that Tak controls the tower space in question and could lease it to Glendale as soon as Glendale replaced WHFT(TV) as the new FCC licensee.

27. However, Tak will not in fact be able to do that. Appended as Attachment 11 hereto is a copy of the current "Tower Space Lease" between Tak and TBF, the incumbent licensee of WHFT(TV).^{17/} Section 10 of the lease specifies that if the Lessee (TBF) loses its FCC license, the lease will not terminate until "the end of a two (2) year period following conclusion of administrative and Court proceedings and appeals." Section 10

^{17/} The original lease was between Candleabra, Inc. (Lessor) and Florida Christian Broadcasting, Inc. (Lessee), of which Tak and TBF are the respective successors-in-interest.

further provides that the lease will not terminate at all if the Lessee's right to broadcast "shall again be restored during such two (2) year period." Thus, contrary to the statement in Tak's offer letter, Glendale would have no access to space on the Candleabra tower for at least two full years after all FCC proceedings and judicial appeals in this case had ended.

30. If Glendale's application is not dismissed at the outset for this fundamental defect,^{18/} then a site availability issue must be designated for hearing. The problem cannot be cured by amendment at this late date, since Glendale could not possibly show the requisite good cause. If Glendale did not know of WHFT(TV)'s two-year holdover right under the tower lease, it should have known. As shown on the face of TBF's Tower Space Lease (in the righthand margin of each page), that document has been on file in the public records of Broward County since January 11, 1973 (Official Records Book 5123, pp. 1-10). Furthermore, an October 1991 Bankruptcy Court order upholding the Tower Space Lease, which is also in the Broward County public records (Official Records Book 18870, pp. 756-57), identifies exactly where in the public records the tower lease itself is found.^{19/} Glendale's failure to examine the existing lease in the public records before relying on the statements in Tak's offer letter reflects a pronounced lack of diligence. (Of course, there is no evidence that Glendale did rely on the offer letter, since it never delivered the required signed acceptance.)

31. Moreover, even if Glendale could somehow show that its ignorance of the two-year lease provision was excusable,

^{18/} See TBF's accompanying "Motion To Dismiss Application of Glendale Broadcasting Company."

^{19/} See Attachment 12 hereto.